Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AIRMAN FIRST CLASS CHRISTOPHER T. HICKS,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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Appellate Defense Counsel
Counsel of Record

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November 1997

29 pp.

QUESTION PRESENTED

Whether the trial defense counsel's failure to evaluate and ensure that documentation submitted "in support of" petitioner's request for clemency did not directly and prejudicially contradict petitioner's personal plea for clemency constituted ineffective post-trial assistance of counsel, such that petitioner was denied his Sixth Amendment right to counsel.

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The petitioner, Airman First Class Christopher T. Hicks, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 12 September 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Hicks*, 46 M.J. 90 (1997), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (AF Ct. Crim App, 28 June 1996) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 12 September 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1996) and 10 U.S.C. § 867(a)(3) (West Supp. 1996).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

After being convicted by military court-martial, petitioner was in confinement at the time his post-trial clemency matters were being prepared for submission to the convening authority. See Petitioner's Affidavit submitted to the Air Force Court of

Criminal Appeals. Petitioner had provided his counsel with a list of names of individuals he thought might be willing to submit matters on his behalf. *Id.* Trial defense counsel assumed responsibility for contacting these individuals and taking in any submissions they made. *Id.*

In a clemency letter on petitioner's behalf, trial defense counsel explained petitioner's clemency request—that the convening authority remit/suspend petitioner's remaining time in confinement, or in the alternative, suspend the adjudged Bad Conduct Discharge. See "Petition for Clemency" dated 16 Feb 1995. Trial defense counsel implored the convening authority: "Before making a decision on clemency, A1C Hicks asks that you review his statements on sentencing, as well as the attached documents in support of his position." *Id.* at para 3.

One of the letters trial defense counsel collected for petitioner's clemency submission was from SSgt Robert J. Fitzpatrick, a direct supervisor of petitioner. *Id.* In this letter, SSgt Fitzpatrick stated

> "During the period A1C Hicks was assigned to me his duty performance was satisfactory. His Dress and Appearance were usually at standards or below. His level of job knowledge and proficiency were also satisfactory. Frankly, before these charges were invoked against him I would not have considered his performance competitive in the fast paced, high standard, heavy responsibility, Crew Chief Career field.
>
> * * *
>
> "In fact, I would never recommend his retention in the Air Force. The fact is that his being in prison is hurting us out on the flightline. As long as A1C Hicks remains in prison our unit doesn't get a replacement for his position. This means that for

> the four months we let him sit in prison he serves a sentence for something HE did, yet at the same time WE out at the 12th pay the price also.
>
> * * *
>
> "I request clemency not on behalf of A1C Hicks who was justly sentenced for something he did, but for the 12th Fighter Squadron Crew Chiefs who will unjustly suffer by another hit to already low manning roster."

Trial defense counsel collected a second letter from SSgt John Thomas, a self-described "friend" of petitioner who'd had contact with him both on and off duty. In his letter, SSgt Thomas stated of petitioner that

> "All aspects of his duty performance were satisfactory. He would rate below most of his peers, although this may have been because of the pressures he felt knowing about his financial problems.
>
> * * *
>
> "I wouldn't recommend A1C Hicks' retention in the Air Force simply because he hasn't adapted to [the] Air Force very well. This doesn't mean he couldn't be extremely successful in the civilian sector. I would request clemency for A1C Hicks on the amount of time spent in prison and also the revocation of his Bad Conduct Discharge to allow for other employment opportunities."

Both of the letters above are dated 2 Feb 1994 (they were apparently misdated since the clemency submissions were prepared in February, 1995). As stated in his post-trial affidavit accepted by the Air Force Court of Criminal Appeals, *supra*, petitioner did not recall ever having been shown

these letters by trial defense counsel. He gave trial defense counsel a list of names, and trial defense counsel took it from there. *Id.*

At the close of his own, 15 February 1995 letter requesting clemency, petitioner opined that

". . . if my peers and supervisors were consulted they would also support my returning to active duty status with my squadron." Repeating this latter statement in the Addendum to the SJAR[1], the Acting Staff Judge Advocate immediately followed it with:

> "A1C Hicks has included two letters from NCOs who worked with him in the 12th Fighter Squadron. They both describe his duty performance as satisfactory, but rate him below par compared against his contemporaries. Both NCO's state they would *not* recommend A1C Hicks be retained in the Air Force; however, one recommends suspension of the BCD and the other asks that A1C Hicks be released from confinement so that his manning slot can be filled early."

See Addendum to the Staff Judge Advocate's Recommendation as contained within the Record of Trial, Volume 1. (emphasis in original). The convening authority granted no clemency.

On 30 December 1994, Airman First Class Hicks was sentenced to a bad conduct discharge, confinement for four months, forfeiture of $555.00 pay per month for four months, and reduction to the grade of E–1. The convening authority approved the sentence on 22 February 1995. In an unpublished decision issued on 28 June 1996, the Air Force Court of Criminal Appeals affirmed as correct in law and fact

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[1]Staff Judge Advocate's Recommendation.

the findings and the sentence. See Appendix B. On 12 September 1997, the United States Court of Appeals for the Armed Forces affirmed the conviction, holding petitioner's defense counsel did not directly or prejudicially contradict his client's post-trial plea for clemency. Additionally, the court held that the failure of the staff judge advocate (SJA) to put the pretrial agreement in proper context was harmless error. *United States v. Hicks*, 46 M.J. 90 (1997). See Appendix A.

REASON FOR GRANTING THE PETITION

The Sixth Amendment guarantees the right to effective assistance of counsel, and in the military this right extends to assistance in the preparation and submission of post-trial matters. See *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994)(counsel's clemency letter may not concede appropriateness of punitive discharge without express consent of client); *United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994) (duty of counsel to make an evaluative judgment and give advice on clemency matters which client proposes to submit); *United States v. Carter*, 40 M.J. 102 (C.M.A. 1994)(emphasizing client's right to assistance of conflict-free counsel in preparation and submission of post-trial matters).

Of greatest relevance in resolving the issue presented by the instant case is *United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994). In *MacCulloch*, the appellant directed his trial defense counsel to include in his clemency submission, matters which counsel would receive from appellant's parents. 40 M.J. 240 (Sullivan, C.J. dissenting). Among the matters which defense counsel received from appellant's parents was a letter which had been written to them by a civilian attorney who'd represented appellant at trial. 40 M.J. at 237–38.

In this letter, civilian counsel implied that appellant had committed more crimes than what he'd been charged with and that the sentence appellant would receive as part of a pretrial agreement was unlikely to be further reduced. 40 M.J. at 240. Trial defense counsel submitted this letter *in toto,* just as he'd received it. The Court of Military Appeals found his action in having done so to constitute ineffective post-trial representation. *See id.*

While the letter was only one of ten items submitted, its effect was to effectively negate any plea for clemency. *Id.* The Court found that trial defense counsel was required to make an evaluative judgment as to what items sent to him by appellant's parents were to actually be submitted to the convening authority. *Id.* at 239. If he thought some matters should not be submitted, he should have so advised appellant. *Id.* Ultimately, the court held that trial defense counsel should have winnowed out what favorable information was contained in civilian counsel's letter and submitted only that information in the form of an executive summary. *Id.* at 240. Trial defense counsel's failure to do so produced a failure of the clemency process, requiring relief. *Id.*

Ineffective assistance of counsel exists where counsel has been deficient in performance and petitioner has been substantially prejudiced thereby. *Strickland v. Washington,* 466 U.S. 668 (1984). Measured against those of *MacCulloch,* the facts of the instant case plainly demonstrate that trial defense counsel was ineffective in his preparation and submission of petitioner's post-trial matters. Indeed, the Court of Appeals for the Armed Forces found the trial defense counsel was deficient on two counts: (1) that "he failed to adequately explain the letters to his client; and (2) he failed to inform the convening authority that SSgt Thomas recommended that appellant receive an administrative

discharge instead of a bad-conduct discharge." *United States v. Hicks*, 46 M.J. 90, 93 (1997).

In his affidavit prepared at the Court's direction, trial defense counsel focused on the fact that the letters at issue (from SSgts Fitzpatrick and Thomas) did contain some language favorable to petitioner's clemency requests. However, he never offered any explanation for his failure to have winnowed out the letters' favorable recommendations (for release from confinement and suspension of the BCD) for submission as an executive summary. Such an approach has been suggested by the Court of Appeals for the Armed Forces in the *MacCulloch* case and would have cured such a troublesome problem. Equally, the trial defense counsel failed to explain why he did not edit or even suggest an edit to petitioner's clemency letter, deleting any reference to petitioner's assertion that peers and supervisors would support his retention in the Air Force and return to duty.

The failure of counsel to have taken either of the latter two steps rendered petitioner's clemency submission at odds with itself, truly negating any plea for clemency. This negation is clearly evident in the SJAR Addendum: petitioner's stated opinion that, if consulted, peers and supervisors, would support his return to active duty is directly contrasted with the two letters from "NCO's who worked with him in the 12th Fighter Squadron" stating that they would *not* (emphasis in the Addendum) recommend petitioner's retention in the Air Force and would rate him below par compared against his contemporaries. The acting staff judge advocate thought such statements so contradictory to the petitioner's personal plea for clemency that she highlighted said statements in the opening few paragraphs of the Addendum.

Though the court below found the defense counsel's conduct did not substantially prejudice the petitioner, the self-

impeaching character of petitioner's clemency package prejudicially and dramatically reduced its effectiveness. *United States v. Lewis*, 42 M.J. 1 (1995) (prejudice required when defense counsel acted in a deficient manner in failing to submit clemency matters as requested by the client). What convening authority would entertain any desire to grant clemency when the petitioner's own attorney submitted character statements from military supervisors who thought the petitioner entirely unworthy of retention in the Air Force. In fact, SSgt Fitzpatrick thought so little of the petitioner that he blamed him for causing the remaining members of the 12th Fighter Squadron to suffer due to the resultant manning shortage. The failure of trial defense counsel to evaluate petitioner's clemency package as a whole, ensuring its internal consistency "blew" petitioner's "last best chance," *MacCulloch*, 40 M.J. at 239, for sentencing relief. *Cf. id. quoting Jones v. Barnes*, 463 U.S. 745, 751–52, 103 S.Ct. 3308, 3312–13, 77 L.Ed. 2d 987, ___ (1983)(Counsel's duty to focus on important issues and winnow out weaker arguments means that "counsel should focus 'on one central issue if possible, or at most on a few key issues.'") Instead of stressing favorable aspects of the petitioner's service, such as his service in Saudi Arabia in support of Operation Southern Watch, the defense counsel allowed these character assassinations to proceed on to the convening authority unchecked by any meaningful evaluative process. Imagine the reaction of the acting staff judge advocate in receiving these "clemency" submissions which so ably demonstrated her position: that the petitioner deserved no clemency. To quote *MacCulloch*, "What we have here is a failure of the clemency process, so relief is required." 40 M.J. at 240.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appellate Defense Counsel
Counsel of Record

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November 1997

APPENDIX A

United States, Appellee

v.

Christopher T. HICKS, Airman First Class
U.S. Air Force, Appellant

No. 96–1212

Crim. App. No. S29025

United States Court of Appeals for the Armed Forces

Argued March 4, 1997

Decided September 12, 1997

Counsel

For Appellant: *Major Carol L. Hubbard* (argued); *Colonel David W. Madsen* (on brief); *Colonel Jay L. Cohen, Lieutenant Colonel Kim L. Sheffield,* and *Captain Todi S. Carnes.*

For Appellee: *Major LeEllen Coacher* (argued); *Colonel Theodore J. Fink* and *Lieutenant Colonel Michael J. Breslin* (on brief).

Amicus Curiae urging affirmance: *Major R.W. Koeneke,* USMC (argued); *Colonel Charles Wm. Dorman,* USMC, and *Commander D.H. Myers,* JAGC, USN.

Military Judge: Donald E. Walsh

Tried at Kadena Air Base, Okinawa, Japan

Opinion of the Court

CRAWFORD, Judge:

Pursuant to his pleas, appellant was convicted at a special court-martial of failing to pay a just debt (5 specifications), in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. The convening authority approved the sentence by the military judge of a bad-conduct discharge, confinement and forfeiture of $555 pay per month for 4 months, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion. We granted review of the following issues:

I

WHETHER TRIAL DEFENSE COUNSEL'S FAILURE TO EVALUATE AND ENSURE THAT DOCUMENTATION SUBMITTED "IN SUPPORT OF" APPELLANT'S REQUEST FOR CLEMENCY DID NOT DIRECTLY AND PREJUDICIALLY CONTRADICT APPELLANT'S PERSONAL PLEA FOR CLEMENCY CONSTITUTED INEFFECTIVE POST-TRIAL ASSISTANCE OF COUNSEL.

II

WHETHER THE CONVENING AUTHORITY'S ACTION SHOULD BE SET ASIDE WHERE THAT OFFICER PRESUMABLY ACTED ON THE ADVICE OF HIS STAFF JUDGE ADVOCATE THAT HE WAS "PERMITTED TO CONSIDER THE FACT THAT A1C HICKS WAS WILLING TO ACCEPT A SENTENCE MORE SEVERE THAN THAT ACTUALLY IMPOSED AT TRIAL WHEN DETERMINING THE APPROPRIATENESS OF HIS SENTENCE.

We hold that appellant's defense counsel did not directly or prejudicially contradict appellant's post-trial plea for clemency. We also hold that failure of the staff judge advocate (SJA) to put the pretrial agreement in proper context was harmless error.

FACTS

After trial, appellant provided defense counsel with a list of individuals who would assist in preparing a clemency package. Trial defense counsel contacted these individuals and they submitted letters on appellant's behalf. Some of the letters, however, were not so favorable as appellant's defense counsel desired.

One of the letters was submitted from Staff Sergeant (SSgt) Robert J. Fitzpatrick, a direct supervisor of appellant; it stated:

> During the period A1C [Airman First Class] Hicks was assigned to me his duty performance was satisfactory. His dress and appearance were usually at standards or below. His level of job knowledge and proficiency were also satisfactory. Frankly, before these charges were invoked against him I would not have considered his performance competitive in the fast-paced, high standard, heavy responsibility, Crew Chief career field.
>
> . . . . In fact, I would never recommend his retention in the Air Force. The fact is that his being in prison is hurting us out on the flightline. As long as A1C Hicks remains in prison our unit doesn't get a replacement for his position. This means that for the four months we let him sit in prison he serves a sentence for something HE did, yet at the same time WE out at the 12th pay the price also.

> I request clemency not on behalf of A1C Hicks who was justly sentenced for something he did, but for the 12th Fighter Squadron Crew Chiefs who will unjustly suffer by another hit to [an] already low manning roster.

Trial defense counsel also collected a letter from SSgt John Thomas which stated:

> All aspects of his duty performance were satisfactory. He would rate below most of his peers, although this may have been because of the pressures he felt knowing about his financial problems.
>
> * * *
>
> I wouldn't recommend A1C Hicks' retention in the Air Force simply because he hasn't adapted to [the] Air Force very well. This doesn't mean he couldn't be extremely successful in the civilian sector. I would request clemency for A1C Hicks on the amount of time spent in prison and also the revocation of his bad-conduct discharge to allow for other employment opportunities.

At the close of his own letter requesting clemency, appellant opined that "if my peers and supervisors were consulted they would also support my returning to active duty status with my squadron." Appellant stated he did not remember seeing these unfavorable letters. As a result of these inconsistencies, the Government sought an affidavit from trial defense counsel, Captain (Caps) David C. Capt C stated that the two letters in question were discussed with appellant and that appellant agreed to their submission as part of the clemency package. Capt C also noted that it was his thought that the convening authority would be more inclined to grant relief if there was a viable picture of appellant.

In the addendum to the SJA's recommendation, the Acting SJA noted appellant had submitted a clemency package and the items were all listed as attachments. The Acting SJA then stated:

> A1C Hicks asks that you grant him clemency by reducing the period of confinement adjudged by the court-martial and suspending his bad-conduct discharge. He asks that you return him to duty in his squadron, and opines "if my peers and supervisors were consulted they would also support my returning to active duty status."
>
> A1C Hicks has included two letters from NCOs who worked with him in the 12th Fighter Squadron. They both describe his duty performance as satisfactory, but rate him below par compared against his contemporaries. Both NCOs state they would *not* recommend A1C Hicks be retained in the Air Force; however, one recommends suspension of the BCD and the other asks that A1C Hicks be released from confinement so that his manning slot can be filled e[illegible].

The defense submits this [illegible] error. The Government argues in turn that this was a plea to change the forfeitures or to seek a limitation on confinement.

The Acting SJA also advised the convening authority in the Addendum as follows:

> Prior to trial, A1C Hicks entered into a pretrial agreement with your predecessor in command, [Brigadier General] William T. Hobbins. A1C Hicks offered to plead guilty to the five specifications of which he now stands convicted, in exchange for a limit on his sentence of a BCD, five months confinement, forfeiture of 2/3 pay per month for six

> months, and reduction to E–1. You are permitted to consider that A1C Hicks wan willing to accept a sentence more severe than that actually imposed at trial when determining the appropriateness of his sentence.

The court below found that defense counsel, Capt C, was acting competently when he submitted the clemency package. He was seeking to appeal to the convening authority concerning mission readiness and to present a credible picture of appellant hoping that would be enough to secure remission of the remaining confinement or suspension of the discharge. It stated, "The fact that a tactic fails to achieve its intended objective does not reflect on the competence of the attorney who attempts it." Unpub. op. at 4.

The court below noted, as to Issue II, that the Acting SJA did not say that the pretrial agreement was clemency but, rather, merely advised that the limitation on the sentence was a factor the convening authority could consider. Unpub. op. at 3.

DISCUSSION

Regardless of indigence, the military accused has the right to the effective assistance of counsel during the pretrial, trial, and post-trial stages. *United States v. Carter,* 40 MJ 102, 105 (CMA 1994); *United States v. Fluellen,* 40 MJ 96, 98 (CMA 1994). This right is guaranteed by the Sixth Amendment and Article 27, UCMJ, 10 USC 827. Additionally, as we stated in *United States v. MacCulloch,* 40 MJ 236, 239 (1994):

> Pursuant to ABA Model Rules of Professional Conduct 1.3 (1983), which has been adopted by the . . . [Air Force, *see* TJAG Policy Letter 26: Rules of Professional Conduct (22 Oct 92)], defendants are entitled to be zealously represented by their attorneys.

As to the effectiveness of counsel, we apply a two-pronged test, the first being the competence prong, and the second being the prejudice prong. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Scott*, 24 MJ 186 (CMA 1987). The *Strickland* Court emphasized that "[j]udicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689. Normally, strategic or tactical decisions do not lead to a showing of a lack of competence. *Id.* at 690–91.

Just as counsel should consult with and keep the client informed as to what is being done on the client's behalf during the pretrial and trial stages, so too should counsel engage in informative discussions with the client during the post-trial stage. During this stage, counsel can petition for deferment of confinement, request clemency, provide written materials which may affect the convening authority's decision, respond to the SJA's recommendation, refer to matters outside the record of which the convening authority would not be aware, and attack matters in the record of trial. Any of these actions may be done to zealously represent the accused.

On the other hand, defense counsel makes the tactical and strategic decisions on what to submit to the convening authority. *MacCulloch*, 40 MJ at 239. Such decisions on these submissions to the convening authority should be made after consultation with the accused. Appellant's defense counsel agreed during oral argument in this Court that, while there is no general requirement to show the letters to the accused, that should be done. Just as the accused controls the right to testify at trial, Standard 4–5.2(a), *ABA Standards for Criminal Justice. The Defense Function* (3d ed. 1993), the accused also has the right to submit or not submit material to the convening authority over defense counsel's objection. *United States v. Lewis*, 42 MJ 1 (1995). But issues similar to those in this case generally or usually will be avoided where there is consultation between counsel and the accused.

We conclude that Capt C made a valid tactical decision to use the two letters to support appellant's plea for minimal confinement. Defense counsel was faced with the challenge of putting the best face on a weak case.

However, defense counsel was deficient on two counts: (1) he failed to adequately explain the letters to his client; and (2) he failed to inform the convening authority that SSgt Thomas recommended that appellant receive an administrative discharge instead of a bad-conduct discharge. Nevertheless, the thrust of appellant's clemency petition—though somewhat unclear—was to minimize confinement, not to obtain remission of the bad-conduct discharge. The convening authority had already referred the case to a special court-martial and had entered into a pretrial agreement providing for a bad-conduct discharge. Thus, there was no reasonable likelihood, in the absence of strong mitigating evidence, that he would suspend or remit the discharge. Defense counsel should have served as more than a robot or a clearing house, and should have discussed with appellant the two letters, as well as their pros and cons. For instance, had appellant objected to using them, appellant's clemency plea would have been without supporting statements and, thus, even weaker than it was with the somewhat derogatory statements. Additionally, Capt C should have urged the convening authority, who was a fighter pilot, to consider that clemency would assist the servicemembers on the maintenance line by giving them additional help. Defense counsel's failure to explain that SSgt Thomas wanted appellant to have an administrative discharge in lieu of a punitive discharge, and his failure to make a more direct appeal to the convening authority as a fighter pilot, does not reflect well on the competence of defense counsel under *Strickland*. Nonetheless, we hold that defense counsel's conduct did not substantially prejudice appellant. *Strickland*, 466 U.S. at 687.

As to Issue II, the Acting SJA commented in response to the clemency package that appellant "was willing to accept a sentence more severe than that actually imposed at trial," referring to the pretrial agreement. These comments were not error. The Acting SJA did nothing more than inform the convening authority of the terms of the pretrial agreement and advise him that he could consider the pretrial agreement as a factor in deciding whether to approve the adjudged sentence, which was less than that provided for in the pretrial agreement. Unlike the situation in *United States v. Kinman*, 25 MJ 99 (CMA 1987), the Acting SJA did not suggest that appellant agreed the sentence was appropriate; she only said that appellant agreed to accept it.

The statement by the Acting SJA might be viewed as "new matter" in the Addendum. There is no indication in the record that the Addendum was served on the defense, but that issue is not before us. Had the Addendum been served as legally required, Issue II would not be before us.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges GIERKE and EFFRON concur.

SULLIVAN, Judge (concurring in the result):

I see no unreasonable attorney performance in this case and disagree with the majority's suggestion that defense counsel's performance violated the competence prong of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. MacCulloch*, 40 MJ 236, 240 (CMA 1994) (Sullivan, J., dissenting). As for Issue II, I would note that this is not a case where evidence of pretrial negotiations was introduced at a court-martial. *See* Mil.R.Evid. 410, Manual for Courts-Martial, United States, 1984, and *United States v. Barunas*, 23 MJ 71, 76 (CMA 1986).

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER T. HICKS, FR218–82–6024
United States Air Force

ACM S29025

28 June 1996

Sentence adjudged 30 December 1994 by SPCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Donald E. Walsh (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $555.00 pay per month for 4 months, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Jay L. Cohen, Lieutenant Colonel G. Michael Lennon, and Captain Todi S. Carnes.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Lieutenant Colonel Michael J. Breslin, and Major LeEllen Coacher.

Before

HEIMBURG, GAMBOA, and SENANDER

Appellate Military Judges

OPINION OF THE COURT

HEIMBURG, Senior Judge:

Consistent with his pleas, the appellant was convicted by special court-martial of five specifications of dishonorable failure to pay just debts, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (1994). His approved sentence is a bad-conduct discharge, confinement for four months, forfeiture of $555.00 pay per month for four months and reduction to E–1. The appellant has raised two assignments of error concerning the post-trial processing of his case. We find no prejudicial error and affirm.

Background

The appellant's trial concluded on December 30, 1994. The staff judge advocate's recommendation (SJAR), dated February 1, 1995, advised the convening authority that the appellant had not yet submitted clemency matters but "he may still do so." He further advised the convening authority that "[y]ou must consider the record of trial, this recommendation, and any matters submitted by A1C Hicks under RCM 1105 and 1106 in reaching your decision." The SJAR was served on the appellant and his counsel on February 6. On February 16, trial defense counsel submitted a "petition for clemency" in which he requested suspension of "any remaining period of confinement" or, in the alternative, suspension of the punitive discharge. Attached to trial defense counsel's letter were a "Request for Clemency" signed by the appellant, dated February 15, 1995, and two articles from the base newspaper.

The appellant's "Request for Clemency" asked for remission of any remaining confinement or, in the alternative, suspension of the punitive discharge. He closed his letter by stating, "I believe that if my peers and supervisors were consulted they would also support my returning to active duty

status with my squadron." Other letters which were submitted, but not listed as attachments to defense counsel's letter, included letters from the appellant's parents and grandparents, requesting that the convening authority not approve the punitive discharge.

Also not referenced by trial defense counsel, but nonetheless submitted to the convening authority, were two letters from noncommissioned officers who supervised the appellant, both dated "2 FEB 1994" (since the trial occurred on December 30, 1994, we assume that both individuals committed the same typographical error, and really meant " 1995"). The first letter, from Staff Sergeant Fitzpatrick, prefaced his comments by observing that the appellant's "Dress and Appearance were usually at standards or below. His level of job knowledge and proficiency were also satisfactory. Frankly, before these charges were invoked against him I would not have considered his performance competitive in the fast paced, high standard, heavy responsibility, Crew Chief Career field." He further stated that although he "would never recommend [the appellant's] retention in the Air Force. . . his being in prison is hurting us on the flightline." He ended his "Request for Clemency" by stating, "I request clemency not on behalf of A1C Hicks who was justly sentenced for something he did, but for the 12th Fighter Squadron Crew Chiefs who will unjustly suffer by another hit to already low manning roster."

Staff Sergeant Thomas, the author of the other letter, characterized himself as a "friend" of the appellant. He described the appellant as "an honest, sincere, person who happened to have financial difficulties which were mismanaged. I feel he didn't realize what was going on very well and didn't realize the repercussions of charging such exorbitant amounts." Like Sergeant Fitzpatrick, Sergeant Thomas "wouldn't recommend [the appellant's] retention in

the Air Force simply because he has not adapted to [the] Air Force very well. This doesn't mean he couldn't be extremely successful in the civilian sector." He requested the convening authority remit any remaining confinement time and disapprove the punitive discharge "to allow for other employment opportunities."

The Addendum to the SJAR, which summarized all of the above information, reminded the convening authority that he had "broad discretion to reduce any punishment imposed at trial," but further opined that the sentence adjudged was appropriate. The acting staff judge advocate closed the Addendum by advising the convening authority that there had been a pretrial plea agreement (limiting the confinement approved to five months) and that he was "permitted to consider that [the appellant] was willing to accept a sentence more severe than that actually imposed at trial when determining the appropriateness of his sentence." The convening authority took action on February 22, 1995, approving the sentence as adjudged.

The Staff Judge Advocate's Recommendation

The appellant complains that the advice contained the Addendum to the SJAR was erroneous, in advising the convening authority that he could consider the sentence limitation imposed by the appellant's pretrial plea agreement. Citing an unpublished decision of this Court, appellate defense counsel argue that the comments in the Addendum amounted to advice that the convening authority had no discretion; that "Hicks has agreed that five months would have been appropriate; he has nothing to complain about after getting only four." We disagree.

First, our unpublished decision is not on point. In that case, the accused was convicted o f multiple indecent acts

against children and sentenced to, *inter alia*, confinement for 20 years. A pretrial agreement limited confinement to 13 years. The SJAR advised the convening authority that clemency was not appropriate because the accused had already received "ample and sufficient *clemency*" (emphasis supplied) by receiving the benefit of the plea agreement. The error we found was the equation of a proposed pretrial agreement sentence cap and clemency.

In this case, the complained-of comments were not legally incorrect or misleading. The Addendum did not represent to the convening authority that the pretrial agreement's 5-month confinement cap amounted to *clemency*. Neither did it advise the convening authority that the pretrial agreement offer by the appellant constituted a representation that 5 months of confinement was *appropriate*. *See United States v. Kinman*, 25 M.J. 99, 101 (C.M.A. 1987). Rather, the Addendum simply advised the convening authority that the fact that the appellant offered a 5-month "cap" was a factor which the convening authority was permitted to weigh in reaching a decision on the appropriateness of the sentence. *See United States v. Hendon*, 6 M.J 171, 175 (C.M.A. 1979); *United States v. El Amin*, 38 M.J. 563 (A.F.C.M.R. 1993). The Addendum and the original SJAR both advised the convening authority that he had discretion to approve a lesser punishment than that adjudged. We find no error.

Ineffectiveness of Counsel

Appellant also complains that he received ineffective post-trial assistance of counsel because his counsel submitted the letters from Sergeants Fitzpatrick and Thomas to the convening authority. "I don't believe my attorney 'assisted' me by submitting these letters, especially in light of the statement I'd made in my letter about believing that peers and supervisors would affirmatively recommend my retention in

the Air Force." He claims to have no memory of reviewing these letters prior to their submission to the convening authority. Because there was no evidence in the record whether the appellant did or not see the letters and agree to their use, we ordered an affidavit from the trial defense counsel. *United States v. Lewis*, 42 M.J. 1 (1995).

The appellant's trial defense counsel, Captain C, responded that he recalled showing both letters to the appellant before he submitted them to the convening authority. He explained that the appellant's goals for clemency changed during the post-trial process. Initially, Captain C was trying to persuade the convening authority to suspend the bad-conduct discharge. Later, after the appellant had "difficulties adjusting to confinement," the appellant became adamant that Captain C attempt to reduce the sentence to confinement as much as possible. That is why, Captain C explained, he first requested the convening authority to suspend or remit the remainder of the confinement, and, if that was "not possible," to suspend the bad-conduct discharge.

The two letters, while not entirely complimentary of the appellant, fit into the appellant's goal of reducing his sentence to confinement. Captain C stated he knew the convening authority was a fighter pilot, and was trying to appeal to "mission readiness" as the basis for giving his client relief from confinement.

A claim of ineffective assistance of counsel requires proof of two elements: incompetence and prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A.), *cert. denied*, ___ U.S.___, 114 S. Ct. 600 (1993) (*quoting United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)).

Reviewing the letters in question in light of Captain C's affidavit, we find them consistent with the appellant's request for clemency. The fact that a tactic fails to achieve its intended objective does not reflect on the competence of the attorney who attempts it. We find that Captain C was not ineffective in his post-trial assistance of the appellant. Since we find no ineffectiveness, we need not look for prejudice.

We conclude that the findings and the sentence are correct in law and fact, the sentence is not inappropriate, and no error prejudicial to the substantial rights of the appellant was committed. Article 66(c), UCMJ. 10 U.S.C. § 866(c) (1994). Accordingly, the findings of guilty and the sentence are

AFFIRMED

Judges GAMBOA and SENANDER concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court